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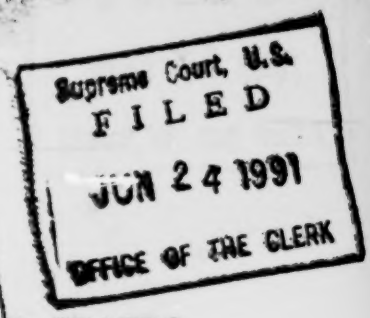

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

E. J. McMANUS AND
ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

STATE OF IOWA, IOWA DEPARTMENT OF
REVENUE AND FINANCE AND GERALD BAIR,

Respondents

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT**

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Supreme Court, U.S.
FILED
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QUESTIONS PRESENTED

1. Does the Tax Injunction Act Title 28 U.S.C.A. §1341 bar suits in federal court for tax refund claims of federal retirees who maintain the State of Iowa discriminated in the taxation of their retirement income contrary to **Davis v. Michigan**, 489 U.S. _____, 109 S. Ct. 1500, 103 L Ed 2d 891?

2. Are these same claims barred under the Eleventh Amendment to the United States Constitution? Should **Hans v. Louisiana,** 134 U.S. 1, 10 S C 504 33 L Ed 842 (1890) be overruled?

3. Are these same claims barred under the principles of comity?

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings below are all identified in the caption.

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The opinion of the United States Court of Appeals for the Eighth Circuit in this case was issued April 3, 1991, but is unreported. No petitions for rehearing were filed. The opinion of the District Court was also unreported. The opinions of the Eighth Circuit and the District Court are reprinted in the Appendix.

JURISDICTION

The Court has jurisdiction to issue a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit under 28 U.S.C.A. §1254. The Eighth Circuit's opinion having been entered April 3, 1991 means this petition is timely under this court's Rule 13 and 28 U.S.C.A. §2101(b).

STATUTES

Title 28 U.S.C.A. §1341, the Tax Injunction Act, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Title 42 U.S.C.A. §2000d-7(a)(1) states:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal Court for a violation of [statutes relating to Rehabilitation, Education, Age Discrimination and Civil Rights] or the provisions of **any other Federal statute prohibiting discrimination** by recipients of Federal financial assistance. [emphasis added]

Title 4 U.S.C.A. §111 provides:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having

> jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

Title 28 U.S.C.A. §1343(3) provides in part:

> . . . The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) To redress the deprivation, under color of any state law, statute . . . . of any right, privilege or immunity secured by the Constitution . . . or by any Act of Congress providing for equal rights of citizens . . .

The following Iowa Statutes and Administrative Rule are involved, but are of such length they are set out in the Appendix: §§421.10, 422.28, 422.29(1) & (2), 422.73(2), 17A.2(9), 17A.19, and IAC 701-7.8(17A).

CONSTITUTIONAL PROVISIONS

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

On November 28, 1989, E. J. McManus filed a class action in the United States District Court, Northern District of Iowa, Cedar Rapids Division, seeking refunds of income taxes paid which he claimed had been unlawfully taken from him by the State of Iowa contrary to the "Public Salary Tax Act", 4 U.S.C.A. §111, as interpreted by **Davis v. Michigan**, 489 U.S. _____, 109 S. Ct. 1500, 103 L Ed 2d 891.

The State of Iowa denied the Petition and moved to dismiss saying these claims were barred under the Eleventh Amendment, the Tax Injunction Act, and principles of comity.

June 14, 1990 the District Court from the District of Nebraska, sitting by designation granted the State's Motion to Dismiss on the sole ground the Court lacked jurisdiction under the Tax Injunction Act.

June 29, 1990, McManus appealed this decision to the Eighth Circuit Court of Appeals which issued a decision April 3, 1991 affirming the trial court's dismissal of the action under the Tax Injunction Act without opinion saying the case would have no precedential value under Eighth Circuit Rule 47B.

Jurisdiction in the trial court is based on 28 U.S.C.A.§ 1331 and that of the Court of Appeals is based on 28 U.S.C.A. §1291.

REASONS FOR GRANTING THE WRIT

Tax Injunction Act

The Tax Injunction Act bars suits in federal court over taxes under State law " . . . where a plain, speedy and efficient remedy may be had in the courts of such state." Under Iowa practice, a taxpayer must file a "protest" with the Iowa Department of Revenue to begin his odyssey for the refund of income taxes. §422.29(1), 422.73(2), 17A.19, IAC(Iowa Administrative Code)701-7.8(17A). McManus filed his protest with the Department, but it refused to either admit or deny the refund claim saying it was awaiting more definitive rulings from this court under cases it thought presented similar issues.

It also argued below it wished to avoid litigating at once the 30,000 refund claims pending before it, its failure to even deny the refund claims was to save the taxpayers the attorney fees in invoking their right of judicial review under §17A.19 of the Iowa Code, and that McManus should await the outcome of what it characterizes as a "test case" (**Hagge v. Iowa Dept. of Revenue & Finance**, Docket No. 90-20-2-0216) where members of the National Association of Retired Federal Employees are seeking refunds at the Department level of income taxes for the same reasons. Despite this protest having been brought in November, 1989, the Department has, to this date, failed to even issue a denial.

If the Department's motives are true, then one would think it would deny the refund claims in the **Hagge** "test case" as the Department would

then only be litigating the several taxpayers' claims there, those taxpayers would alone bear the expense of such litigation and a quicker proceeding would be begun leading to a decision from the Iowa Supreme Court.[1]

However, the Department's behavior is merely a strategy of indecision to "hold the taxpayers at bay" for if it granted one refund claim it would have to grant all the others. If it denies one, it more clearly invokes the thirty day time period for starting judicial review under §17A.19 which would lead to an earlier decision than the Department wishes since it would take the risk of

---

[1]The Department argued below §17A.19's requirement for "final agency action" before judicial review may be had is met by §17A.2(9)'s definition of "agency action" which includes a "failure" to act but §17A.19 runs the thirty day period for beginning judicial review from "final" agency action and doesn't have a provision similar to Iowa State Tort Claims Act, §25A.5, giving the state six months to make an administrative decision, which more clearly contemplates a failure to act.

having to refund millions of dollars in taxes to the retirees.

At the Department (or administrative) level, Iowa appears to prevent class action litigation under **Quaker Oats Co. v. Cedar Rapids Human Rights Com'n.**, 268 N.W. 2d 862 (Iowa 1970) @ p. 867, rt. col. [8].

The Iowa Statutes themselves are confusing on the taxpayer's remedy for refunds. Iowa's Chapter 17A is its administrative procedure act and §17A.19, ostensibly including the Department of Revenue, requires parties to exhaust their administrative remedies before invoking judicial review. I.A.C. §701-7.8(17A), cited above, was evidently issued by the Department under this chapter.

However, long before the existence of Chapter 17A, and always remaining in effect

alongside that chapter, are the provisions of Chapter 422 of the Iowa Code which also govern tax refunds. §422.73(2) requires a tax be refunded if it is not due under that chapter, implying only state standards are available for refunds instead of the Public Salary Tax Act at issue here on the merits. §422.29(1) also expressly grants judicial review under the Iowa Administrative Procedure Act (implying the language of Chapter 17A was not sufficient to do this) which refers to §422.28 which in turn requires a tax be **assessed** before a taxpayer has remedies. §422.29(2) requires a taxpayer post a bond in double the amount of the tax which makes no sense when a taxpayer seeks a refund.

The Department argued below §421.10 gave McManus a plain, speedy and efficient remedy where it says the appeal period for a revision of

"assessment . . . under . . . 422.28 . . . " applies to appeals from Department action ". . . **denying** refund claims . . . " The problem with this statute is the Department refuses to either admit or deny refund claims preventing §421.10 from operating.

Further Exceptions Under the Tax Injunction Act

Besides the express exceptions for plain, speedy and efficient remedy, there are other exceptions to the Tax Injunction Act. There is the "federal instrumentality" doctrine and the "real and significant interest" the United States may have in the claiming party. There is also an independent jurisdictional basis in 28 U.S.C. §1343(3), giving district courts jurisdiction over civil actions to redress the deprivation of rights granted by any act of Congress providing for equal rights of citizens. Here McManus argues that because the Public Salary Tax Act allows states to

tax federal employees as long as they don't "discriminate" then his claims fall within §1343(3) describing statutes providing for "equal rights" of citizens.

The last United States Supreme Court decision McManus finds discussing many of these issues is **Moe v. Confederated Salish & Kootenai Tribes**, 425 U.S. 463, 96 S. Ct. 1634, 48 L Ed 2d 96 (1976). There the court allowed an Indian tribe to sue the State of Montana over taxes on cigarettes and motor vehicles under a substantive theory akin to the federal instrumentality doctrine despite the Tax Injunction Act.

In **Moe** the Supreme Court didn't believe the theory of "real and significant interest" was sufficient to get around the Tax Injunction Act (adopted by trial court, 392 F. Supp. @ 1303) so it examined 28 U.S.C.A. §1362 which gave the

federal courts jurisdiction over "all civil actions" brought by Indian tribes. But because **Moe** believed "all civil actions" too broad to be an exception, 425 U.S. @ 472, 96 S. Ct. @1641 (lft. col.), it then examined the legislative history but finding this " . . . hardly an unequivocal statement of intent to allow such litigation to proceed . . ." it examined cases decided **before** the Tax Injunction Act (96 S. Ct. @1641 n. 13) granting the United States "capacity" to sue as trustee on behalf of the Indians for various federal rights given them and concluded the tribe could sue.

The United States was not a party in **Moe.** Its reasoning was based in part on the case of **Department of Employment v. United States**, 385 U.S. 355, 87 S. Ct. 464, 17 L Ed 2d 414 (1966) recognizing the theory of the federal instrumentality doctrine permitting the United

States to sue on behalf of the American Red Cross for unemployment taxes collected by the State of Colorado. **Moe** declined to base its decision on Title 28 U.S.C.A. §1343(3) (96 S. Ct. @1642 n. 14).

These theories may have their genesis in Title 28 U.S.C.A. §1345 granting federal courts jurisdiction over suits brought by the United States which has been interpreted to give such jurisdiction regardless of the subject matter of the controversy. **United States v. State of California**, 328 F. 2d 729 @ 734, lft. col., 1st full ¶ (CA 9, 1964). There are cases granting individual Indians the right to sue where the United States could have but did not, **Agua Caliente Band of Mission Indians v. County of Riverside**, 442 F. 2d 1184(CA 9 1971) @ 1186, but this has been somewhat denigrated in **Housing Auth. Etc. v.**

State of Washington, 629 F. 2d 1307 (CA 9 1980) where the court denied a federal instrumentality the right to sue a state over the state's disobedience to federal statutes providing for low income housing saying that although the government had a strong interest in low income housing ". . . it does not have the exclusive and compelling interest which attaches to its oversight of Indian affairs." (p. 1313).

Eleventh Amendment

In terms this amendment withdraws judicial power from the entire federal court system as to suits against states by citizens of other states or foreign countries. In terms it appears to merely repeal the state citizen diversity language of Article III. However, the amendment has been interpreted as being merely an example of sovereign immunity granted states,

the seminal decision for which may be **Hans v. Louisiana**, 134 U.S. 1, 10 S. Ct. 504, 33 L Ed 842 (1890), which McManus asks this court to overrule. The term "judicial power" has been interpreted to mean the amendment withdraws subject matter jurisdiction from federal courts over suits against states, especially where "retroactive relief" is sought which usually means extracting money from state treasuries. **Atascadero State Hospital v. Scanlon**, 473 U.S. 234, 105 S. Ct. 3142, 87 L Ed 2d 171 (1985).

However, there are exceptions to the bar of the amendment, which are that of "congressional abrogation," "waiver," and the "diversity theory." Congressional abrogation evidently says if a federal statute is clear enough authorizing suit against states then it will be permitted despite the amendment. Waiver evidently is usually

connected with viewing the amendment as providing an example of sovereign immunity which by some accounts may be waived. The diversity theory, not yet adopted by this court, says the amendment only affects the state citizen diversity subject matter jurisdiction of Article III permitting suit against states in federal court if a federal question is involved. See Brennan's dissent in **Atascadero**.

The constitutional authority for congressional abrogation seems to have begun with Section 5 of the Fourteenth Amendment giving Congress the power to "enforce" the substantive provisions of that article that are explicitly directed at the States. **Fitzpatrick v. Bitzer**, 427 U.S. 445 @ 456, 96 S. Ct. 2666 @ 2671 (rt. col. ¶ [1-3], 49 L. Ed. 2d 614 (1976).

The analogous "necessary and proper" clause of Article 1, Section 8, has also been thought to do the same thing. **Pennsylvania v. Union Gas Co.**, 109 S. Ct. 2273 (1989)

McManus believes his case at least comes within the congressional abrogation theory under Title 42 U.S.C.A. §2000d7(a)(1) because that statute eliminates a state's Eleventh Amendment immunity for violations of, among other statutes, " . . . **any other Federal statute prohibiting discrimination** . . . " As the Public Salary Tax Act, Title 4 U.S.C.A. §111, provides the United States consents to the taxation of its employees by states ". . . if the taxation does not **discriminate** against the . . . employee . . . " [emphasis added], then Iowa's immunity under the Eleventh Amendment has also been eliminated.

In **Pennsylvania v. Union Gas**, Justice Stevens points out the anomaly of the United States Supreme Court believing it capable of reviewing these cases despite "judicial power" being withdrawn from the entire spectrum of the federal system. 109 S. Ct. @ 2286-2289. This court has recently reviewed this issue again in **McKesson v. Division of Alcoholic Beverages, Etc. of Florida, et al.**, 110 S. Ct. 2238 (1990).

Another anomaly on the merits is that in **Davis v. Michigan** the taxpayer was denied prospective relief because federal courts couldn't order states to impose taxes (103 L. Ed 2d @ 907). He got a refund because Michigan conceded the point (103 L. Ed. 2d @ 906).

Here the State of Iowa argues the taxpayers should be denied retroactive relief and evidently also argue they should be denied prospective

relief as well either in state or federal court. If true, then although the taxpayers have been wrongfully taxed under the Public Salary Tax Act, they are given no relief whatsoever.

Comity

The inherent bias in our system of government against permitting suits against states in federal courts is so great that if neither the Eleventh Amendment nor the Tax Injunction Act prohibits the suits, then the decisional law will do so through the theory of comity. **Fair Assessment in Real Estate v. McNary,** 454 U.S. 100, 70 L Ed 2d 271, 102 S. Ct. 177 (1981). However, if the purpose of this extraordinary reluctance to permit suits against states in federal courts is to prevent undue interference with state affairs by the federal government, then it is another irony perpetuated by the law that the present suits

should be similarly prohibited because it is the **states** that have unduly interfered with federal affairs. It should be remembered the states have disobeyed a federal statute, the Public Salary Tax Act, and the disobedience doesn't affect citizens generally but it affects **federal employees only**. Thus, any decisional rule giving some deference to state autonomy should be even less of an impediment to this suit than would be the Eleventh Amendment and the Tax Injunction Act as argued above.

CONCLUSION

It is ironic that at common law (at least among subjects) injunctive relief was considered the extraordinary remedy and often conditioned on the inadequacy of the legal one (which usually meant money damages.) Between a subject and the sovereign, however, just the reverse is true -

the subject cannot get money damages, retroactive relief, as the courts think prospective injunctive relief sufficient. If the purpose of all these rules preventing suits in federal court against states is to accord great deference to the sovereignty of the states, then it is the ultimate irony the lower federal courts should be denied jurisdiction when the very basis of the suit here is the states have unduly interfered with the federal sovereign's enumerated powers of Article I, Section 8.

APPENDIX

The following trial court decision was issued June 14, 1990 by the Honorable Lyle R. Strom of Omaha, Nebraska sitting by designation:

This matter is before the Court on defendant's motion to dismiss (Filing No. 4).

Defendants filed their motion pursuant to Fed. R. Civ. P. 12(b)(1).

Plaintiff, E. J. McManus, filed his complaint as a class action seeking refunds for income taxes paid to the State of Iowa. In 1953, Iowa Code Ann. §97B.39 was enacted[1] which provided that retirement benefits paid to Iowa public employees shall "be exempt from taxation, either as income or as personal property."

On March 28, 1989, the United States Supreme Court, in *Davis v. Michigan*, 489 U.S. ____, 103 L. Ed. 2d 891 (1989), held that a Michigan statute violated 4 U.S.C. §111 by discriminating in the tax treatment between federal and state retirees in that it exempted the state retirees' income from state taxation but not

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[1] Acts 1953 (55 G.A.) Ch. 72§39.

that of the federal retirees.[2] In interpreting §111, the Supreme Court stated that its meaning is unmistakable. Specifically, it waives whatever immunity past or present federal employees would otherwise enjoy from state taxation of salaries, retirement benefits, and other forms of compensation paid on account of their employment with the federal government, except to the extent that such taxation discriminates on account of the source of the compensation. *Id.* at ____, 103 L. Ed. 2d at 901. The exception to the waiver of intergovernmental tax immunity contained in the final clause of §111 closely

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[2]The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

parallels the nondiscrimination component of the constitutional immunity doctrine which bars taxes that discriminate against the government or those with whom it deals. *Id.* at ____. 103 L. Ed. 2d at 903. The Court held that, because Michigan's tax system discriminated in favor of retired state employees and against retired federal employees, an appropriate remedy was a mandate of equal treatment. *Id.* at ____. 103 L. Ed. 2d at 906. This result can be accomplished either by a withdrawal of benefits from the favored class or accomplished by extending benefits to the excluded class. *Id.*

In response to the *Davis* decision, the Iowa legislature amended § 97B.39 by deleting the language which had relieved state retirement benefits from taxation, either as income or as

personal property.[3] The amendment was passed on May 26, 1989, but is retroactive to tax years beginning on or after January 1, 1989.

Plaintiff filed his complaint seeking refund of state taxes paid for the tax years prior to January 1, 1989. The issue before the Court is whether jurisdiction exists to entertain plaintiff's cause of action in obtaining refund of taxes. Controlling here is the Tax Injunction Act, 28 U.S.C. 1341, which provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The United States Supreme Court stated that the Tax Injunction Act generally prohibits federal district courts from enjoining state tax

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[3]Amended by Acts 1989 (73 G.A.) ch. 228, §2.

administration except in instances where the state court remedy is not "plain, speedy and efficient." *See Rosewell v. LaSalle National Bank*, 450 U.S. 503, 512 (1981). It is the Court's duty to withhold relief when it appears that the state legislature has provided a procedure for a tax payer to recover a challenged tax payment, and where the tax payer may also assert constitutional claims. The proceeding must afford full protection to the taxpayer's federal rights. *Id.* The Tax Injunction Act has its roots in equity practice, principles of federalism, and in recognition of the imperative need of a state to administer its own fiscal operations. *Id* at 522. This last consideration was the principal motivating force behind the Act and is to limit drastically federal district court jurisdiction to interfere with so important a local concern as the

collection of taxes. *Id.* In addition, taxpayers are bound by the principle of comity from asserting §1983 actions against the validity of state tax systems in federal courts, provided the taxpayer may seek protection of federal rights by the state remedies and the state remedies are plain, adequate and complete. *See Fair Assessment in Real Estate Assoc. v. McNary*, 454 U.S. 100, 116 (1981).

Plaintiff filed a refund claim pursuant to Iowa Code Ann. 422.72(2) on April 15, 1989, seeking "refunds of state taxes paid on income that should not have been taxed pursuant to the *Davis* decision" (Plaintiff's complaint, Par. 18). If the Iowa Department of Revenue and Finance denies the refund claim, the plaintiff's remedy is to file a protest or appeal with the Department. *See* Iowa Code Ann. § 421.10 and § 422.28. The

plaintiff can pursue adverse decisions of the Director of Revenue and Finance in district court by filing a judicial review action pursuant to Iowa Code Ann. § 422.29. An appeal may be taken to the Iowa Supreme Court irrespective of the amount involved. See Iowa Code Ann. §422.29(3). The state remedies afford full hearings and judicial review at which the plaintiff may raise all legal arguments, including any constitutional objections. The plaintiff has failed to demonstrate that there are inadequate state remedies available. Thus, this Court is barred from entertaining plaintiff's cause of action. Plaintiff's assertion of a violation of 42 U.S. C. § 1983, does not cure this prohibition. *See Fair Assessment in Real Estate Assoc. vs. McNary*, 454 U.S. 100 (1981). Accordingly, the Court will grant defendant's motion to dismiss plaintiff's complaint. A

separate order in accordance with this memorandum opinion will be entered this date.

Dated this 12th day of June, 1990.

Pursuant to the memorandum opinion entered herein this date,

IT IS ORDERED that defendants' motion to dismiss (Filing No. 4) is granted; plaintiff's complaint is dismissed.,

DATED this 12th day of June, 1990.

April 3, 1991 the United States Court of Appeals for the Eighth Circuit issued the following decision:

PER CURIAM.

McManus appeals from the district court's[1] dismissal of his class action suit seeking refunds

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[1] The Honorable Lyle E. Strom, Chief Judge, United States District Court for the District of Nebraska, sitting by designation.

for income taxes paid to the state of Iowa. The district court based its dismissal on the grounds that because Iowa provides a plain, speedy, and efficient state court remedy, the Tax Injunction Act, 28 U.S.C. § 1341 (1988), barred McManus' suit. See Rosewell v. LaSalle Nat'l. Bank, 450 U.S. 503, 512 (1981). We believe that an opinion in this matter would have no precedential value and that the district court correctly dismissed the suit. Therefore, we affirm. See 8th Cir. R. 47B.

Statutes

§17A.19 of the Iowa Code provides in part:

> 1. A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof under this chapter.
>
> . . .

> 3. If a party files an application . . . for rehearing with the agency, the petition for judicial review must be filed within thirty days after that application has been denied or deemed denied. If a party does not file an application . . . for rehearing, the petition must be filed within thirty days after the issuance of the agency's final decision in that contested case.

§17A.2 of the Iowa Code provides in part:

> As used in this chapter:
>
> . . .
>
> 9. "*Agency action*" includes the whole or a part of an agency rule or other statement of law or policy, order, decision, license, proceeding, investigation, sanction, relief, or the equivalent or a denial thereof, or a failure to act, or any other exercise of agency discretion or failure to do so, or the performance of any agency duty or the failure to do so."

§422.73(2) of the Iowa Code provides in part:

> If it appears that an amount of tax . . . has been paid which was not due under division II [on income taxes] . . . of this chapter, then . . . that amount shall be refunded to the person . . .

§422.28 provides in part:

> A taxpayer may appeal to the director for revision of the tax, interest or penalties assessed at any time within sixty days from the date of the notice of the assessment of tax, additional tax, interest or penalties. The director shall grant a hearing and if, upon the hearing, the director determines that the tax, interest or penalties are excessive or incorrect, the director shall revise them according to the law . . .

§422.29 provides in part:

> 1. Judicial review of actions of the director may be sought in accordance with the terms of the Iowa Administrative Procedure Act.
>
> . . .
>
> 2. The petitioner shall file with the clerk a bond for the use of the respondent, with sureties approved

> respondent, with sureties approved by such clerk, in penalty at least double the amount of tax appealed from . . .

§421.10 of the Iowa Code provides:

> The appeal period for revision of assessment of tax, interest, and penalties set out under section. . . 422.28, . . . applies to appeals to notices from the department denying changes in filing methods, denying refund claims, and denying portions of refund claims for the tax covered by that section.

IAC[Iowa Administrative Code] §701-7.8(17A) provides:

> Protests. Any person wishing to contest an assessment, refund claim, or any other department action, . . . shall file a protest, in writing, with the department . . . to the director for a hearing. . . .

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Supreme Court, U.S.
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(2)

No. 90-1957

In The

Supreme Court of the United States

October Term, 1991

E. J. McMANUS AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

STATE OF IOWA, IOWA DEPARTMENT OF REVENUE AND FINANCE AND GERALD BAIR,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Iowa

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Do the Tax Injunction Act (28 U.S.C. § 1341) and the principle of comity bar the federal court from hearing the Petitioners' tax refund claim?

2. Does the eleventh amendment bar the federal court from hearing the Petitioners' tax refund claim?

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CONSTITUTIONAL PROVISIONS AND STATUTES

The eleventh amendment bars the federal court from hearing the Petitioners' tax refund claim. It states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Also, there is a statutory provision which bars the federal court from hearing the Petitioners' tax refund claim. The Tax Injunction Act (28 U.S.C. § 1341) states:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Iowa statutory provisions which provide a plain, speedy and efficient remedy include Iowa Code §§ 421.10, 422.28 and 422.29 (1991). *See also* Iowa Code § 17A.19 (provides for judicial review of agency action). These Iowa statutory provisions state:

> **§ 421.10 Appeal period – denial of taxpayer's claim.**
>
> The appeal period for revision of assessment of tax, interest, and penalties set out under section . . . *422.28*, . . . applies to appeals to notices from the department denying changes in filing methods, *denying refund claims*, and *denying portions of refund claims for the tax covered by that section*.

(Emphasis added).

422.28 Revision of tax.

A taxpayer may appeal to the director for revision of the tax, interest or penalties assessed at any time within sixty days from the date of the notice of the assessment of tax, additional tax, interest or penalties. The director shall grant a hearing and if, upon the hearing, the director determines that the tax, interest or penalties are excessive or incorrect, the director shall revise them according to the law and the facts and adjust the computation of the tax, interest or penalties accordingly. The director shall notify the taxpayer by mail of the result of the hearing and shall refund to the taxpayer the amount, if any, paid in excess of the tax, interest or penalties found by the director to be due, with interest after sixty days from the date of payment by the taxpayer at the rate in effect under section 421.7 for each month or a fraction of a month. The director may, on the director's own motion at any time, abate any portion of tax, interest or penalties which the director determines is excessive in amount, or erroneously or illegally assessed.

422.29 Judicial review.

1. Judicial review of actions of the director may be sought in accordance with the terms of the Iowa administrative procedure Act. Notwithstanding the terms of said Act, petitions for judicial review may be filed in the district court of the county in which the petitioner resides, or in which the petitioner's principal place of business is located, or in the case of a nonresident not maintaining a place of business in this state either in any county in which the income involved was earned or derived or in Polk county, within sixty days after the petitioner shall have received notice of a determination by the director as provided for in section 422.28.

. . . .

3. An appeal may be taken by the taxpayer or the director to the supreme court of this state irrespective of the amount involved.

STATEMENT OF THE CASE

On November 28, 1989, E. J. McManus filed a class action in the United States District Court, Northern District of Iowa, Cedar Rapids Division, seeking refunds of income taxes paid to the state of Iowa. He claims that the income taxes paid to the state of Iowa were illegally imposed on retirement income of federal retirees. As authority, he cites to *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989).

The *Davis* decision could have a decisive impact on Iowa. In Iowa (until 1989 Iowa Acts, ch. 228 was enacted), state and its political subdivisions' employees' retirement benefits were exempt from Iowa income tax. However, pursuant to Iowa Code § 422.5(6) (1989) (repealed, 1989 Iowa Acts, ch. 228), federal retirement benefits (in excess of $5,627 on a single return and in excess of $8,184 on a joint return) were taxed. This was the same type of tax treatment that existed in Michigan. The Iowa legislature, as a result of the United States Supreme Court decision in *Davis v. Michigan Department of the Treasury*, enacted 1989 Iowa Acts, ch. 228 so that Iowa and federal retirees are treated the same.

A question arises with respect to tax refunds and whether Iowa will have to pay them. Iowa Code § 422.73(2) provides for certain refunds if timely claimed.

If not timely claimed, there can be no refund, even if the refund claim is based upon the unconstitutionality of a tax statute. *Burrill v. Locomobile Co.*, 258 U.S. 34 (1922). Whether an Iowa court or the Supreme Court would hold that the Supreme Court's decision in *Davis v. Michigan Dept. of Treasury* should not operate retroactively to require that refunds be given is unanswered at this point.

At page 14 of the Petition for Writ of Certiorari, Petitioners cite to *Hagge v. Iowa Department of Revenue and Finance*, Docket No. 90-20-2-0216. This is a test case in Iowa pertaining to whether *Davis v. Michigan* should be applied retroactively or prospectively. Although the caption of the case lists only Mr. Hagge, the case is being litigated as a test case on behalf of the National Association of Retired Federal Employees.

Instead of pursuing his state administrative remedies in litigating the retroactive versus prospective application of *Davis v. Michigan*, as the National Association of Retired Federal Employees is, McManus wants to litigate the matter in federal district court for himself and all others similarly situated, seeking a refund of income tax paid. The state of Iowa and the Iowa Department of Revenue and Finance moved to dismiss, claiming the federal district court lacked subject matter jurisdiction under the principles of comity, the Tax Injunction Act (28 U.S.C. § 1341) and the eleventh amendment of the United States Constitution.

On June 14, 1990, the federal district court dismissed McManus' action for lack of subject matter jurisdiction. McManus appealed this decision to the Eighth Circuit Court of Appeals. On April 3, 1991, the Eighth Circuit

Court of Appeals affirmed the district court without opinion saying the case would have no precedential value.

SUMMARY OF THE ARGUMENT

McManus has cited no authority which is in conflict with the district court decision and Eighth Circuit Court's affirmation of the decision.

Under Iowa Code §§ 421.10 and 422.28, the Iowa test case (*Hagge v. Iowa Department of Revenue and Finance*, Docket No. 90-20-2-0216) will be argued before the Director of Revenue and Finance on July 30, 1991. Assuming an unfavorable decision for federal employees, the National Association of Retired Federal Employees will seek judicial review in Iowa district court and ultimately the case can be appealed to the Iowa Supreme Court. *See* Iowa Code § 422.29. Iowa taxpayers (retired federal employees) have a plain, speedy and efficient remedy where they have a full hearing before the agency and judicial review which allows them to raise any and all legal arguments, including constitutional objections, concerning their requests for income tax refunds.

The eleventh amendment also bars the federal courts from hearing Petitioners' tax refund claim. *Edelman v. Jordan*, 415 U.S. 651 (1974); *accord Melof v. Hunt*, 718 F. Supp. 877 (M.D. Ala. 1989) (a *Davis* related lawsuit). Thus, since no basis for the grant of certiorari has been presented, certiorari should be denied.

REASONS TO DENY THE PETITION

I. PETITIONERS HAVE IDENTIFIED NO SPECIAL OR IMPORTANT REASONS WHY A PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Petitioners have cited no conflicting decisions by other United States courts of appeals on the issues, nor have they cited decisions departing from the accepted understanding of 28 U.S.C. § 1341 as set forth by the district court and affirmed by the Eighth Circuit Court of Appeals. The circuit court's decision is consistent with decisions of other courts. *See, e.g., Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981); *Fair Assessment in Real Estate Ass'n v. McNary*, 478 F. Supp. 1231, 1234 (E.D. Mo. 1979), *aff'd*, 622 F.2d 415 (8th Cir. 1980), *aff'd*, 454 U.S. 100 (1981); *Franchise Tax Board of California v. Alcan Aluminium Limited*, 493 U.S. 331 (1990); *Todd v. Johnson*, 718 F. Supp. 1305 (S.D. Miss. 1989); *Waldron v. Collins*, 788 F.2d 736 (11th Cir. 1986).

Furthermore, as is set forth in the Statement of Facts, the Iowa courts will be deciding the issue of whether *Davis v. Michigan Dept. of Treasury* should operate retroactively in a test case being litigated by the National Association of Retired Federal Employees entitled *Hagge v. Iowa Department of Revenue and Finance*, Docket No. 90-20-2-0216. Also, this issue was before the United States Supreme Court in two cases from Virginia (*Harper v. Virginia Dept. of Taxation*, No. 90-1685, and *Lewy v. Va. Dept. of Taxation*, No. 90-1772) and one from South Carolina (*Bass v. South Carolina*, No. 90-673). These cases were vacated and remanded [59 U.S.L.W. 3864 (U.S. June 28, 1991)] for reconsideration in light of *James B. Beam Distilling Company v. Georgia*, 59 U.S.L.W. 4735 (U.S. June 20, 1991). All these cases present the issue of whether *Davis*

v. Michigan Dept. of Treasury should be applied retroactively or prospectively. Therefore, assuming arguendo that the federal district court has jurisdiction to hear Petitioners' claim for refunds, the merits of that claim should be resolved before this Court could review this case and remand it to the district court, the district court decide the issue, and appeals be exhausted from the district court's decision.

II. THE DISTRICT COURT'S DECISION TO DISMISS PETITIONERS' TAX REFUND CLAIM, WHICH WAS AFFIRMED BY THE EIGHTH CIRCUIT COURT OF APPEALS, IS CONSISTENT WITH PRIOR PRECEDENTS LITIGATED UNDER THE TAX INJUNCTION ACT (28 U.S.C. § 1341) AND THE PRINCIPLE OF COMITY, AND NO UNSETTLED IMPORTANT QUESTIONS OF FEDERAL LAW HAVE BEEN PRESENTED BY PETITIONERS.

The district court did not have jurisdiction over this action requesting a refund of income taxes. The Tax Injunction Act (28 U.S.C. § 1341) states:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The jurisdictional prohibition which prevents federal district courts from interfering with the administration of state tax systems has been clearly outlined by the courts. *See, e.g., Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981); *Fair Assessment in Real Estate Ass'n v. McNary*, 478 F. Supp. 1231, 1234 (E.D. Mo. 1979), *aff'd*, 622 F.2d 415 (8th

Cir. 1980), *aff'd*, 454 U.S. 100 (1981); *Franchise Tax Board of California v. Alcan Aluminium Limited*, 493 U.S. 331 (1990); *Moss v. State of Georgia*, 655 F.2d 668, 669 (5th Cir. 1981). The jurisdictional barrier does not depend upon the form of relief that the taxpayer seeks. It applies not only to actions seeking injunctive relief, but also to actions for *refund of tax paid* or for damages. *Fair Assessment in Real Estate Ass'n v. McNary*, 478 F. Supp. 1231, 1233 (E.D. Mo. 1979), *aff'd*, 622 F.2d 415 (8th Cir. 1980), *aff'd*, 454 U.S. 100 (1981); *Marvin F. Poer and Co. v. Counties of Alamedo*, 725 F.2d 1234, 1236 (9th Cir. 1984); *Moss v. State of Georgia*, 655 F.2d 668, 669 (5th Cir. 1981). Furthermore, the prohibitions of 28 U.S.C. § 1341 cannot be evaded by framing the complaint as one for declaratory relief. *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982); *Franchise Tax Board of California v. Alcan Aluminium Limited*, 493 U.S. 331 (1990).

All that is required by § 1341 is "a state court remedy that meets certain minimal *procedural* criteria." *Rosewell v. LaSalle National Bank*, 450 U.S. at 512 (emphasis in original); *Todd v. Johnson*, 718 F. Supp. 1305 (S.D. Miss. 1989) (military retirees were denied access to federal court in a *Davis v. Michigan* type of case). The state remedy need not "be the best remedy available or even equal to or better than the remedy which might be available in the federal courts." *Bland v. McHann*, 463 F.2d 21, 29 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973). *Accord Waldron v. Collins*, 788 F.2d 736, 738 (11th Cir. 1986); *Todd v. Johnson*, 718 F. Supp. 1305, 1308 (S.D. Miss. 1989); *Melof v. Hunt*, 718 F. Supp. 877, 883 (M.D. Ala. 1989) (all these cases involve lawsuits in *Davis v. Michigan* type of cases pertaining to federal or military retirees). *See Rosewell*, 450 U.S. at 515

(disallowance of interest under state law does not render state remedy inadequate).

The Iowa law provides for a full hearing before the agency and judicial review which allows Petitioners to raise any and all legal arguments including constitutional objections concerning the request for income tax refunds. *See* Iowa Code §§ 421.10 and 422.28 (1991); 701 Iowa Admin. Code § 7.8; Iowa Code §§ 17A.19 and 422.29 (1991). Therefore, the § 1341 requirement concerning adequate state remedies is satisfied.

Petitioners' action for refunds of income taxes paid is further barred in federal court by the principle of comity, where there are plain, adequate, and complete state remedies available. *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981); *Todd v. Johnson*, 718 F. Supp. 1305, 1307 (S.D. Miss. 1989) (military retirees barred access to federal court in a *Davis v. Michigan* type of case). There is no difference between remedies which are "plain, adequate, and complete" for purposes of the principles of comity and those which are "plain, speedy and efficient" within the meaning of 28 U.S.C. § 1341. *Fair Assessment*, 454 U.S. at 116 n. 8.

The Supreme Court in *Fair Assessment* examined the comity principle. The Court discussed the local concern in the collection of taxes and federal court reluctance to interfere with state fiscal operations, and summarized its concerns by quoting the district court with approval:

> "To allow such suits would cause disruption of the states' revenue collection systems equal to that caused by anticipatory relief. State tax collection officials could be summoned into federal court to defend their assessments *against claims*

> *for refunds* as well as prayers for punitive damages, merely on the assertion that the tax collected was willfully and maliciously discriminatory against a certain type of property. Allowance of such claims would result in this Court being a source of appellate review of all state property tax classifications." Fair Assessment in Real Estate Assn. Inc. v. McNary, 478 F.Supp. 1231, 1233-1234 (1979).

454 U.S. at 114 (emphasis added).

Petitioners cannot show that there were inadequate state remedies available to them. In fact, the named petitioner, E. J. McManus, did pursue his remedy by filing a refund claim pursuant to Iowa Code § 422.73(2) (1991). In the aftermath of *Davis v. Michigan*, thousands of other Iowa taxpayers have also filed refund claims pursuant to Iowa Code § 422.73(2) (1991). There are taxpayers willing to pursue their remedies for income tax refund claims in state litigation. Rather than litigating thousands of cases at the same time, there is a test case in Iowa concerning the application of *Davis v. Michigan*. *Hagge v. Iowa Department of Revenue and Finance*, Docket No. 90-20-2-0216, will be heard by the Director of Revenue and Finance on July 30, 1991. Obviously, Mr. Hagge and the National Association of Retired Federal Employees believe they have a "plain, speedy and efficient" remedy.

The state of Iowa and the Iowa Department of Revenue and Finance will abide by the Iowa Supreme Court decision on judicial review of *Hagge v. Iowa Department of Revenue and Finance*, Docket No. 90-20-2-0216, (or any other applicable Iowa or United States Supreme Court decisions) for all federal civil service retirees. If refunds must be paid, they will be paid with interest.

The named petitioner (E. J. McManus) has several options, as do "all others similarly situated" included as petitioners. To date, he has expressed no interest in pursuing his state remedies. Furthermore, if unwilling to await the outcome of the Iowa test case and/or similar cases pending in other states which may be presented to the United States Supreme Court, he can take judicial review of the Department's failure to act on his refund claim. *See* Iowa Code § 17A.2(9) (1991) ("agency action" includes "a failure to act, or any other exercise of agency discretion or failure to do so, or the performance of any agency duty or the failure to do so"). His petition for judicial review would *not* be limited to the thirty day filing limitation. Iowa Code § 17A.19(3) (1991) provides that "[i]n cases involving a petition for judicial review of agency action other than the decision in a contested case, the petition may be filed at any time petitioner is aggrieved or adversely affected by that action." *See Oliver v. Teleprompter Corp.*, 299 N.W.2d 683, 687 (Iowa 1980) (thirty day limit for filing petition for judicial review applies only to appeals from contested case decisions, not to "other agency action").

It is clear that, once a refund claim is denied, Iowa Code § 421.10 (1991) and 701 Iowa Admin. Code § 7.8 provide Petitioners with an adequate remedy. These provisions of Iowa law state:

> **§ 421.10 Appeal period – denial of taxpayer's claim.**
>
> The appeal period for revision of assessment of tax, interest, and penalties set out under section . . . *422.28*, . . . applies to appeals to notices from the department denying changes in

> filing methods, *denying refund claims,* and *denying portions of refund claims for the tax covered by that section.*

(Emphasis added).

> **701-7.8(17A) Protests.** Any person wishing to contest an assessment, *refund claim, or any other department action,*. . . . shall file a protest, in writing, with the department . . . to the director for a hearing. The protest must be either delivered to the department by United States Postal Service, by ordinary, certified, or registered mail, directed to the attention of the administrative law judge, personally delivered to the office of the administrative law judge, or be served on the department by personal service.

(Emphasis added). Petitioners continue to ignore these provisions of Iowa law even though they were cited in the Iowa Department of Revenue and Finance brief filed in the federal district court.

Contrary to the claim at page 15 of the Petition for Writ of Certiorari, the Iowa Department of Revenue and Finance is not trying to "hold the taxpayers at bay." The Department is keeping Iowa taxpayers informed of developments on the tax refund issue in its *Tax News* letter. (See App. 1a)

Petitioners speculate that their remedy is not plain, speedy and efficient under the Tax Injunction Act (28 U.S.C. § 1341). The Tax Injunction Act is not made inapplicable because of Petitioners' mere speculations. *Franchise Tax Board of California v. Alcan Aluminium Limited,* 493 U.S. 331 (1990).

At pages 19-22 of the Petition for Writ of Certiorari, Petitioners cite to various Indian cases. Since Petitioners

are not an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, these cases do not apply to the Petitioners' tax refund claims. *See Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 472-73 (1976) (legislative history of 28 U.S.C. § 1362 indicated a congressional purpose to permit Indian tribes to sue under this section in federal court).

Petitioners also cite to *Housing Authority, Etc. v. State of Washington*, 629 F.2d 1307 (9th Cir. 1980), which discusses the various Indian cases cited by the Petitioners. That case clearly indicates that the Indian cases do not support the Petitioners' argument. The case states:

> Cases involving Indian tribes as plaintiffs present special considerations. The moral and legal obligations of the United States toward Indian tribes place the tribes in a special posture when seeking relief in federal courts. This special posture has been codified in 28 U.S.C. § 1362. . . .
>
> . . . .
>
> Without an explicit directive from Congress analogous to § 1362, we are reluctant to extend the "special interest" rationale beyond its application to Indian tribes.

629 F.2d at 1312-13.

III. THE DISTRICT COURT'S DECISION TO DISMISS PETITIONERS' TAX REFUND CLAIM, WHICH WAS AFFIRMED BY THE EIGHTH CIRCUIT COURT OF APPEALS, IS SUPPORTED BY THE ELEVENTH AMENDMENT.

Although the district court's decision was based on the Tax Injunction Act (28 U.S.C. § 1341), the decision to

dismiss the Petitioners' tax refund claim is also supported by the eleventh amendment. The eleventh amendment to the United States Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

In *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974), this Court held that a federal court's remedial power under the eleventh amendment is limited to prospective injunctive relief and may *not* include a retroactive award *which requires the payment of funds from the state treasury.*[1] *Accord Melof v. Hunt*, 718 F. Supp. 877 (M.D. Ala. 1989) (a lawsuit filed in the aftermath of the U. S. Supreme Court's decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989)).

Petitioners' argument that 42 U.S.C. § 1983 and 4 U.S.C. § 111 give the federal court jurisdiction is without merit.[2] *See Quern v. Jordan*, 440 U.S. 332, 338 (1979) (in enacting § 1983 Congress did not intend to abrogate the sovereign immunity of the states guaranteed by the eleventh amendment).

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[1] *Edelman* made it clear that the eleventh amendment bars suits brought in federal court by the state's own citizens as well as by citizens of another state. 415 U.S. at 662.

[2] Section 111 is a codification of the United States Supreme Court's modern constitutional doctrine of intergovernmental tax immunity. *Davis v. Michigan Department of Treasury*, 489 U.S. at 812-13.

Congress has the authority to permit a suit for monetary damages against a state in federal court when legislating pursuant to § 5 of the fourteenth amendment or the commerce clause. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). Petitioners appear to argue at page 25 of the Petition for Writ of Certiorari that 4 U.S.C. § 111 stems from the commerce clause (article I, § 8). Assuming arguendo that 4 U.S.C. § 111 was passed pursuant to the fourteenth amendment or the commerce clause, an intent to sweep away the immunity of the states cannot be inferred from this fact alone. Not only must there be a showing that legislation was adopted by Congress pursuant to the powers granted under the fourteenth amendment or the commerce clause but, further, Congress must show this intention to abrogate the states' immunity in *unmistakably clear language in the statute. Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985); *Pennsylvania v. Union Gas Company*, 491 U.S. 1 (1989); *Hoffman v. Connecticut Income Department*, 492 U.S. 96 (1989); *Dellmuth v. Muth*, 491 U.S. 223 (1989). Petitioners have not shown that Congress unequivocally set forth in the statute that it intended to abrogate the states' eleventh amendment immunity from suit in federal court.

Petitioners cite to 42 U.S.C. § 2000d-7(a)(l) as authority for the argument that Congress intended to abrogate the states' eleventh amendment immunity from suit in federal court. 42 U.S.C. § 2000d-7(a)(l) states:

> **§ 2000d-7. Civil rights remedies equalization**
>
> **(a) General provisions.** (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in

> Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 USCS § 794], title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

Petitioners claim that the language "or the provisions of any other federal statute prohibiting discrimination by recipients of federal financial assistance" is this so-called expressed intention of Congress to abrogate the states' eleventh amendment immunity from suit in federal court. (Petition for Writ of Certiorari p. 25). Petitioners ignore the fact that 4 U.S.C. § 111 pertains to "pay or compensation for personal service"[3] while 42 U.S.C. § 2000d-7(a)(1) pertains to "recipients of federal financial assistance," an entirely different subject matter.

In summary, not only do 4 U.S.C. § 111 and 42 U.S.C. § 2000d-7(a)(1) concern entirely different subject matters but, further, there is no evidence that Congress in unmistakably clear language in 4 U.S.C. § 111 abrogated the

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[3] 4 U.S.C. § 111 states:

> The United States consents to the taxation of *pay or compensation for personal service* as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source *of the pay or compensation*.

(Emphasis added).

states' eleventh amendment immunity from suit in federal court for refund of taxes (assuming arguendo that 4 U.S.C. § 111 was passed pursuant to article I, § 8 of the United States Constitution).

CONCLUSION

Petitioners' complaint was properly dismissed for lack of subject matter jurisdiction by the United States District Court, as affirmed by the United States Court of Appeals for the Eighth Circuit. The eleventh amendment, the Tax Injunction Act (28 U.S.C. § 1341) and the principle of comity bar the federal court from hearing the Petitioners' tax refund claim. For all of the above stated reasons, the Department of Revenue and Finance respectfully requests that Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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From the Office of the Director

In ruling in Davis v. Michigan that 4 U.S.C. §111 prohibited the disadvantageous taxation of federal employee retirement benefits comparative to state and local government employee retirement income, the U.S. Supreme Court initiated a chain of events not yet concluded.

Some 27 states, including Iowa, were impacted by the Courts' ruling. Most have now amended state law in conformity with the Davis decision, providing equality of taxation of federal retirement benefits.

The issue still unresolved in 19 of these states, including Iowa, is whether the Davis decision is to be applied prospectively from 1989 or retroactively, entitling thousands of federal retirees to refunds in these states for tax years prior to 1989.

An Iowa case is currently pending in administrative process on the issue of retroactivity of the Davis decision. This case may be appealed to the Iowa Supreme Court, where we will finally achieve resolution of the status of the 30,000 amended Iowa returns filed by federal retirees. A similar case pending appeal in South Carolina, however, may bring resolution prior to this case reaching the Iowa Supreme Court.

I must stress that the appeal process will be lengthy. We do not anticipate that this issue will be resolved for many months. We will, however, keep you apprised of any developments through future issues of the "Tax News".

Sincerely,

G.D. Bair

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